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Supreme Court, U.S.
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No. 04-1295

In the Supreme Court of the United States

ALBERT J. AVENAL, et al,
Petitioners,

- against -

THE STATE OF LOUISIANA and
THE DEPARTMENT OF NATURAL RESOURCES,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE LOUISIANA SUPREME COURT

OPPOSITION BRIEF OF RESPONDENTS, THE STATE OF LOUISIANA THROUGH THE LOUISIANA DEPARTMENT OF NATURAL RESOURCES

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QUESTIONS PRESENTED

1. May litigants waive their federal claims in both federal and state appellate courts and then, after all their state claims have been dismissed by a state's highest court, seek to revive their federal claims again in a petition for certiorari to this Court?

2. Where a state's highest court has ruled that Petitioners have no claims under that state's constitution, can Petitioners recharacterize those claims as federal claims in order to gain access to this Court?

3. Should this Court consider a decision from a state's highest court which has been based upon "background principles" of state law?

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STATEMENT OF THE CASE

The Plaintiffs/Petitioners accurately described this state litigation in their opposition brief when last before this Honorable Court on the State's Petition (No. 00-456), as follows:

> "The Plaintiffs/Respondents are a class of oyster leaseholders who instituted this inverse condemnation action in Louisiana State Court against the State of Louisiana, Department of Natural Resources, ("the DNR") under Article I, Section 4 of the 1974 Louisiana Constitution. They allege that the DNR's construction and operation of the Caernarvon freshwater diversion structure effected a "taking" of their oyster leases by diverting freshwater from the Mississippi River into Breton Sound (where their leases are located) and lowering the salinity levels there below that necessary to support oyster cultivation."[1]

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[1] In their latest filing, i.e., this Petition, Plaintiffs erroneously argue that the State of Louisiana "in an abrupt change of policy" began to operate the Caernarvon Fresh Water Diversion ("Caernarvon") in 1991. (Petition for Certiorari, p. 3.) To the contrary, as recounted at length by the Louisiana Supreme Court in its opinion, the State of Louisiana has been studying coastal restoration in this particular location for decades, began developing the Caernarvon project in the early 1980's, began constructing the Caernarvon structure in approximately 1987, and then began operating the structure in 1991. *Avenal*, 886 So2d 1085, 1088-1092 (La. 2004) (Plaintiffs' Petition for Certiorari App. 7-13 (hereinafter cited as "App.")). Since the well publicized purpose of Caernarvon and other freshwater diversion projects was to change the salinity of the water in coastal Louisiana, the State began inserting an indemnity provision into its oyster leases with oyster fishermen in 1989, which allowed the state to continue to issue oyster leases. By the time suit was filed in this case in 1994, most of the leases in the class area in Breton Sound contained this indemnity clause. As also recounted by the Louisiana Supreme

There is absolutely no mention made in Petitioners' previous description of the case of any federal claims. Indeed, the Petitioners had previously abandoned their federal claims the same year they filed their earlier brief in this Court in No. 00-456.

As to the history of their federal claims, it is true that in 1994 when the Petitioners had filed their original Petition in the state district court they had indeed asserted claims under both the Louisiana Constitution and the Fifth Amendment of the United States Constitution. They had also asserted the same federal claims against the United States in the parallel federal litigation in the Court of Federal Claims. These claims were eventually dismissed by the Federal Circuit because the Petitioners had lacked reasonable investment-backed expectations in their oyster leases. *Avenal v. The United States,* 100 F.3d 933 (Fed. Cir. 1996). The Petitioners chose not to seek further relief with this Court at that time. Thus, the federal judgment that held that they had no federal claims became final.

Subsequently, the DNR filed several dispositive exceptions and motions for summary judgment in the parallel state proceedings. One of those motions sought to establish the preclusive effects of the Federal Circuit's decision *vis a vis*

Court, the oyster fishing industry actively sought these very coastal restoration efforts, which would and did lower salinity in Breton Sound but increased oyster populations in some areas of Breton Sound by as much as 300%! *Avenal*, 886 So2d at 1090, 1112 (App. 54). For Plaintiffs to profess surprise or a change in policy by the State regarding Caernarvon is simply incorrect. Furthermore, the coastal restoration project is restoring the salinity to its historical level, before the advent of accelerating coastal erosion due to the construction of levees along the Mississippi and other rivers, which prevent replenishment of essential nutrients and sediment, and increase salinity, all of which conditions hasten coastal erosion. *Avenal*, 886 So.2d at 1088-1092 (App. 7-13).

Petitioners' claims in the state litigation, which the Trial Court denied. The DNR then sought relief with the Louisiana Fourth Circuit Court of Appeal which initially held that federal law must be applied to "determine the preclusive effects of a judgment rendered by a federal court exercising federal question jurisdiction." *Avenal v. State*, 757 So.2d 1, 5 (La.App. 4th Cir. 1999), citing, *Reeder v. Succession Palmer*, 623 So.2d 1268, 1271 (La. 1993). On this basis, the Fourth Circuit Court of Appeal then applied a federal analysis relative to collateral estoppel (or issue preclusion) and dismissed Petitioners' claims "under both the United States and Louisiana Constitutions since the federal judgment precludes relitigation of an issue which a federal court has already decided." 757 So.2d at 8.

The 3-2 split panel disagreed only on the dismissal of the state claims. In his dissent, Appellate Judge James F. McKay stated, "I agree with the majority opinion as it applied to Plaintiffs' *federal* claims," but he "would not grant the summary judgment insofar as it applies to any claims which Plaintiffs may have under *state* law." 757 So.2d at 8, 9 (emphasis added).

Petitioners thereafter petitioned for rehearing but only as to the dismissal of their State law claims, stating that, "it is important to stress that this action seeks compensation pursuant to the Louisiana rather than the Federal Constitution." (Plaintiffs/Respondents' Supplement Brief on Rehearing, p. 1.)

In line with the requested relief, the Fourth Circuit granted their petition for rehearing and reinstated their state law claims. *Avenal v. State*, 757 So.2d at 9 (La.App. 4th Cir. 2000). The Fourth Circuit's decision was based upon its conclusion that federal constitutional law related to the Fifth Amendment differed from Louisiana constitutional law because "the legal standard of what constitutes a taking under the Louisiana Constitution is different." 757 So.2d at 11. The Fourth Circuit

also held that "distinct investment-backed expectations of *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed. 2d 631 (1978), is [sic] irrelevant to the question of whether a taking has occurred under Louisiana law." 757 So.2d at 13.

The two accompanying opinions further emphasized the fact that only the state law claims survived. The Fourth Circuit's decision partially reinstated the case. First, the sole concurrence likewise analyzed the claims solely under Louisiana law indicating that "prior knowledge of an anticipated expropriation is not a bar to compensation under Louisiana law." 757 So.2d at 13. Likewise, the dissent by Judge Miriam G. Waltzer indicated that the only question that had been addressed was "what is a taking under the Louisiana Constitution." 757 So.2d at 14.

Subsequently, the Louisiana Supreme Court denied the DNR's application for supervisory review. *Avenal v. State*, 2000-1077 (La. 6/23/00), 767 So.2d 41. As was the case with the parallel federal proceeding, Plaintiffs/Petitioners did not seek further appellate relief on the second dismissal of their federal claims with either the Louisiana Supreme Court or this Court. Consequently, the dismissal of the federal claims became a final judgment in the state court system as well.

Meanwhile, DNR then petitioned for certiorari in this Court which was denied. *Louisiana Dep't of Natural Resources v. Avenal*, 531 U.S. 1012, 148 L.Ed. 2d. 486, 121 S.Ct. 568 (2000). Significantly, Petitioners' description of the case within their earlier brief in opposition to DNR's previous Petition to the Court repeatedly indicated that their claims were brought solely under Article I, Section 4 of the 1974 Louisiana Constitution and Louisiana law. See Opposition Brief of Plaintiffs,(then Respondents) No. 00-456, p. 3 ("There is no compelling reason

to grant the DNR's application for a writ of certiorari in this case because the lower Louisiana Court decision turned exclusively on its interpretation and application of Louisiana law."); and, p. 7 ("The issue before the Louisiana Fourth Circuit, therefore was whether a different legal standard applied to the leaseholders' claims under Article I, Section 4 of the 1974 Louisiana Constitution than was applied by the Federal Circuit under the federal constitution.")

When this Court thereafter denied the DNR's Petition for Certiorari (No. 00-456), DNR had exhausted all avenues of interlocutory relief. The matter thereafter proceeded to trial in state district court as a class action on the state constitutional claims alone. The Petitioners submitted proposed jury charges which only sought compensation under Article 1, Section 4 of the Louisiana Constitution of 1974. (See Petitioners' Proposed Jury Charges.) The Trial Court thereafter adopted the Petitioners' proposed jury charges in its jury instructions. (See Trial Court's Jury Instructions.) The jury determined that a taking had occurred under state law and awarded the Plaintiffs/Petitioners $21,345 per acre for oyster leases for which the annual rent is only $2.00 per acre, resulting in a judgment to the class of approximately $1.3 *billion*, perhaps the largest in the history of takings law in the United States. The Trial Court entered judgment solely on the basis of Article I, Section 4 of the Louisiana Constitution of 1974. (See January 10, 2001 Judgment).

DNR appealed to the Fourth Circuit which affirmed (3-2) for the most part, only to add additional money to lead Plaintiff, Albert Avenel. One dissenting appellate judge indicated that the damages "shock the conscience." *Avenal v. State*, 858 So.2d 697, 708 (La.App. 4th Cir. 11/21/03) (Love, J. dissenting)(App. 86). The DNR then applied for writs of certiorari and review as

well as supervisory writs to the Louisiana Supreme Court. The writs were granted.

In its thirty-five page opinion, the Louisiana Supreme Court ruled that nearly all of the claims of the Plaintiffs/Petitioners, should be dismissed because their oyster lease forms contained the contractual indemnity clause in favor of the State. The Louisiana Supreme Court held that these clauses were justified by state law, i.e., "the oyster statutes" (La. R.S. 56:3 *et seq.*), Louisiana contractual law of indemnity, and, Art. IX, Sec. 1 of the Louisiana Constitution. *Avenal*, 886 So.2d at 1098-1099, 1102-1103, 1100-1110 (La. 2004) (App. 24-30, 34-38, 48-51). As to the remaining claims for twelve of the Plaintiffs' leases which did not have indemnity clauses, the Louisiana Supreme Court held that these were prescribed or time-barred based upon the applicable prescriptive period under Louisiana Civil Law. *Avenal,* 886 So.2d at 1109-1110 (App. 51). While the Louisiana Supreme Court specifically referred to Art. I, Sec. 4 of the Louisiana Constitution as the basis for Petitioners' claims in both its preamble and conclusion, the Fifth Amendment of the United States Constitution was discussed in only one footnote, 886 So.2d at 1107-1108, n.28 (App. 45-47). Therefore, the Fifth Amendment could have had little, if any, bearing on the Louisiana Supreme Court's decision. Yet, Petitioners now seek a writ of certiorari based upon this one footnote.

ARGUMENT

I. THE PETITIONERS WAIVED FURTHER APPELLATE REVIEW OF ANY FEDERAL CLAIMS WHICH HAD ALL BEEN DISMISSED BY BOTH FEDERAL AND STATE APPELLATE COURTS.

This Court will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision sought to be reviewed. *Heath v. Alabama*, 474 U.S. 82, 87 (1985). A federal claim must be presented with "fair precision and in due time." *Adams v. Robertson*, 520 U.S. 83, 88 (1997). Review must be denied to a petitioner who fails to properly present a federal question to the highest state court. *Parker v. Illinois*, 333 U.S. 571 (1948).

The record is clear that the Petitioners intended to forego their takings claims under the federal Fifth Amendment so as to pursue their claims only under the Louisiana Constitution. As a result, the Louisiana Supreme Court's opinion issued in this matter was based entirely on Article I, Section 4 of the Louisiana Constitution of 1974. The Plaintiffs' earlier federal claims were discussed in detail in a lone footnote of a thirty-five page opinion, rendering the Court's comments on the federal claims dicta at best. Indeed, in treating Petitioners' claims as including claims under the federal constitution, the Louisiana Supreme Court went outside the scope of the case actually before it.

More specifically, as far back as 1999, the Petitioners had specifically disclaimed any rights under the Fifth Amendment, pointing out to the Louisiana Fourth Circuit Court of Appeal that "[I]t is important to stress that this action seeks compensation pursuant to the Louisiana rather than the federal constitution." (Plaintiffs/Respondents' Supplemental Brief on Rehearing, p. 1.)

This was an acknowledgment by the Petitioners that they were estopped from pursuing a claim under the Fifth Amendment because those same claims had been dismissed by the Federal Circuit in *Avenal v. United States,* 100 F.3d 933 (Fed. Cir. 1996), from which they had sought no relief. In 1999, the Louisiana Fourth Circuit Court of Appeals had also dismissed the Petitioners' federal claims. *Avenal v. State*, 99-0127 (La. App. 4th Cir. 03/03/99), 757 So.2d 1, 8. In the lone dissenting opinion, which would form the majority opinion on rehearing, appellate judge James McKay agreed that the federal claims must be dismissed, *Id.* On rehearing, Judge McKay authored the opinion which only reinstated the Petitioners' claims under the Louisiana Constitution. *Avenal v. State*, 99-0127 (La. App. 4th Cir. 03/03/99), 757 So.2d 9, 11.

Contrary to the assertions in their Petition, the Petitioners did *not* appeal this judgment insofar as any claims under the Fifth Amendment were concerned. (See Petitioners' Brief of Appellant to Fourth Circuit, Petitioners' Brief of Appellee to Fourth Circuit and Petitioners' Original Brief to the Supreme Court of Louisiana.) In fact, in their brief filed in opposition to the State's earlier Petition for Certiorari to this Court, the Plaintiffs previously stated "the DNR's Petition for a Writ of Certiorari should be denied because it seeks review of a state appellate court decision applying well-settled principles of state law," not federal. (Opposition Brief, No. 00-456, p. 4.)

Under Louisiana procedural law, the Petitioners waived whatever federal claims they might have had by failing to seek further appellate relief below. This is because it is well settled under Louisiana law that when a judgment is silent to a demand at issue under the pleadings, such silence constitutes absolute rejection of the demand. *Succession of Foster*, 122 So.2d 96, 98 (La. 1960). Consequently, the Petitioners were prohibited from seeking to enlarge their rights under the Trial Court's decree for

the first time on an application for a writ of certiorari to the Louisiana Supreme Court had they attempted to do so. *Logan v. Louisiana Dock Co., Inc.*, 541 So.2d 182, 192 (La. 1989). Likewise, the Petitioners are prohibited from attempting to do so now under federal law. *U.S. v. American Railway Express Co.*, 265 U.S. 425 (1924).

A review of the proceedings below, clearly show that Petitioners intentionally abandoned their federal claims. Both of the Louisiana appellate courts which reviewed the Trial Court's Judgment analyzed the Petitioners' claims solely under Article I, Section 4 of the Louisiana Constitution of 1974, not the Fifth Amendment. The Louisiana Fourth Circuit's opinion makes clear that, in accordance with the Trial Court's Judgment, the Petitioners were only awarded damages under Article I, Section 4 of the Louisiana Constitution of 1974. *Avenal v. State of Louisiana,* 2001-08843 (La. App. 4th Cir. 10/15/03) 858 So.2d 697, 702 (App. 75-76). Indeed, there is no mention whatsoever of an award by the Trial Court under the Fifth Amendment or any other federal theory.

Moreover, the Louisiana Supreme Court states that it granted DNR's writ application to determine if the Petitioners were entitled to compensation under Article I, Section 4 of the Louisiana Constitution of 1974, not the federal Fifth Amendment. *Avenal*, 886 So.2d at 1095 (App. 20). The holding of the Louisiana Supreme Court is that the Petitioners were not entitled to compensation under Article I, Section 4 of the Louisiana Constitution of 1974. *Avenal*, 886 So.2d at 1088, 1109-1110 (App. 6-7, 51). Accordingly, the Louisiana Supreme Court decided this issue under Louisiana, not federal, law.

The Petitioners' entire basis for asserting federal question jurisdiction lies in footnote 28 of the Louisiana Supreme Court's opinion, wherein the Court noted that the Petitioners asserted

(although did not adjudicate) a claim under the Fifth Amendment. *Avenal*, 886 So.2d at 1107-1108 (App. 45-47). As this issue was neither adjudicated in the Trial Court nor appealed by the Petitioners, the Louisiana Supreme Court's analysis is *obiter dicta*, i.e., statements by the Court that are "unnecessary to the decision in the case, and therefore not precedential though [they] may be considered persuasive." *Co-Steel Raritan, Inc. v. International Trade Commission*, 357 F.3d 1294, 1307 (Fed. Cir. 2004). Dictum includes any statement of law by a court "merely by way of illustration, argument, analogy, or suggestion." *Co-Steel, supra*.

It is also plainly evident that the Court's treatment of the Petitioners' Fifth Amendment claim was hypothetical. For example, the Court comments that "if Caernarvon did entirely deprive them of all economically beneficial and productive use of their property rights, the plaintiffs are still not entitled to compensation" under federal law. *Avenal*, 886 So.2d at 1107 (App. 46). Yet the Court, just one page earlier, held that Caernarvon did not, in fact, deprive the Petitioners of all economically beneficial and productive use of their property rights because the evidence revealed that some of their leases were still producing oysters, they continued to exercise their right to claim damage to their leases from oil and gas exploration activities conducted on their leases, and, had filed damage claims with the federal government as a result of Hurricane Andrew. *Avenal*, 886 So.2d at 1107 (App. 44).

Furthermore, footnote 28 stresses that "even analogizing the operation of Caernarvon to a regulatory taking" the Petitioners would not be entitled to compensation under federal law. *Avenal*, 886 So.2d at 1108 (App. 46). Similarly, Justice Weimer's concurring opinion discusses federal takings law as a "comparison" to the property rights guaranteed under the

Louisiana Constitution. *Avenal*, 886 So.2d at 1112-1114 (App. 57-59).

It is clear that the Petitioners did not properly present a Fifth Amendment claim in state court. No Fifth Amendment claim was properly before the Louisiana Supreme Court and none was decided. The only Fifth Amendment claims the Petitioners ever properly presented had been dismissed by the Federal Circuit nine years ago, and the Louisiana Fourth Circuit six years ago, and the Plaintiffs abandoned all further federal efforts until now. The only issue before the Louisiana Supreme Court was whether there was a taking under Article I, Section 4 of the Louisiana Constitution of 1974. The Petitioners were content to rely on the Trial Court's award of damages under Article I, Section 4 of the Louisiana Constitution. This issue was decided purely on the basis of state law. There is no federal question for this Court to review. The Petitioners cannot attempt to amend the Trial Court's Judgment now to include such a claim for the first time in their Petition to this Court. Accordingly, the Petition must be denied on jurisdictional and/or procedural grounds.

II. FURTHER APPELLATE REVIEW OF THIS MATTER IS NOT WARRANTED BECAUSE THE STATE'S HIGHEST COURT DECIDED THE CASE BASED UPON LOUISIANA LAW INCLUDING THE CIVIL LAW CONCEPT OF PRESCRIPTION.

When a state-court decision is clearly based on independent state law that is both adequate and independent, this Court will not review the decision. *Illinois v. Rodriguez*, 497 U.S. 177, 182 (U.S., 1990), citing, *Michigan v. Long*, 463 U.S. 1032, 1041, 77 L.Ed. 2d 1201, 103 S.Ct. 3469 (1983). The mere reference to, or mention of federal issues in the State Court opinion does not change this analysis. *Uhler v. AFL-CIO*, 468

U.S. 1310 (1984); *Montanans for Balanced Federal Budget Committee v. Harper*, 469 U.S. 1301 (1984). As the Louisiana Supreme Court made clear, its decision was based entirely upon state law:

> "After review of the record and the applicable law, we reverse the judgments of the lower courts and hold that the vast majority of the oyster fisherman are not entitled to compensation under La. Const. Art. I Section 4 because their leases contain clauses holding the State harmless from any loss or damage resulting from this coastal diversion project. Further, we hold that the claims of the oyster fisherman whose leases do not contain hold harmless clauses have prescribed under La.R.S. 9:5624." *Avenal v. State*, 886 So.2d at 1088 (App. 7).

There is absolutely no mention in this holding of federal constitutional law or the Fifth Amendment of the United States Constitution, simply because the Louisiana Supreme Court did not rely upon those sources of law to reach its decision. The Petitioners' theory is based solely upon one footnote in a thirty-five page unanimous decision from the State's highest court and a ten page concurring opinion, all of which Petitioners simply fail to mention. The issue is then whether the Petitioners can create a federal case out of that one footnote. Particularly note worthy is the fact that Petitioners' present contention that this case somehow presents, or is based upon, an entirely federal issue is completely contrary to their earlier position that this case consists entirely of state law issues when this same matter was previously before this Court on a Petition for Certiorari in No. 00-456.

As to what law the Louisiana Supreme Court did address and rely upon in its opinion, that Court had upheld the indemnity

clause in favor of the State because it was consistent and appropriate under the Louisiana "oyster statutes" which define the limited property interest held by the Plaintiffs/Petitioners. *Avenal*, 886 So.2d at 1095-1096, citing, La.R.S. 56:3 *et seq.* (App. 20-22). The Court also pointed out that the clause was consistent with other provisions of the Louisiana Constitution including Article VII, Section 14 and Article IX, Section 3, which prohibited the State from alienating its own water bottoms and tendering title to the Petitioners. *Id.* Finally, the Court held that the clause was perfectly consistent with the state's police power and the public trust doctrine embodied in Article IX, Section 1 of the Louisiana Constitution. *Avenal,* 886 So.2d at 1101-1102 (App. 33-35).

Thus, the Louisiana Supreme Court defined the limited nature of Petitioners' property rights under, and subject to, "background principles" of applicable Louisiana law in line with this Court's jurisprudence, recognizing "the restrictions that background principles of the state's law on property and nuisance already place upon land ownership." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992). These included relevant Articles of the Louisiana Constitution, the Louisiana "oyster statutes" and the lease form itself including its indemnity clause, all purely Louisiana sources of law which define the limited property interest Plaintiff/Plaintiffs hold. As to the remainder of the claims, the civil law concept of prescription rendered the twelve remaining claims of the Plaintiffs/Petitioners time-barred under La. R.S. 9:5624. *Avenal,* 886 So.2d at 1109-1110 (App. 51). Consequently, even this last issue was decided solely under Louisiana state law. Consequently, this entire case was decided below solely upon the Louisiana Supreme Court's construction of Louisiana law and there is no reason for this Court to review the decision below.

III. THE PETITIONERS PRESENT NO REASON FOR THIS COURT TO REVISIT THE DISTINCTION BETWEEN REGULATORY AND PHYSICAL TAKINGS.

The Louisiana Supreme Court decided this case based upon the limited nature of Petitioners' property interest, (i.e., what was "not part of their title to begin with," *Lucas*, 503 U.S. at 1026-27) by applying "background principles" of Louisiana property law. In defining Petitioners' property interest, the Louisiana Supreme Court noted that no court in Louisiana had ever concluded that the Louisiana "oyster statutes" had given Petitioners a right to sue the state for damages to oyster leases resulting from coastal restoration projects. *Avenal*, 886 So.2d at 1100 n.20 (App. 32). The Court also made it clear that under Louisiana law, the Petitioners have no right to the remedy they sought, i.e., the right to recover the "exorbitant amount of damages" for the cost of "restoring" the state's own water bottoms. *Avenal*, 886 So.2d at 1094, n.10 (App. 19).

In addition to pointing out what property rights and obligations the Petitioners did *not* have, that Court also held that Petitioners had contractually obligated themselves to indemnify the State for any such damages as a "compromise" for the lease itself, *Avenal*, 886 So.2d at 1096 (App. 23), an obligation that was consistent with both the state's police power and the public trust doctrine under the Louisiana Constitution. *Avenal*, 886 So.2d at 1101-1102, 1108 (App. 34, 46-47). Finally, that Court held that there was no formal acquisition of Petitioners' property interest by the state since Petitioners still have their oyster leases, and are still making claims against third parties and the federal government related to those leases. All of these conclusions are based solely upon interpretations of Louisiana law in fact, background principles of Louisiana law related to property, contracts and the state's constitution.

Even if the case did present a federal constitutional issue (which it does not), neither of the issues set out by Petitioners would warrant granting a writ of certiorari. This Court recently explored at length the distinction between government limitations on the use of property and physical occupations, (see *Tahoe-Sierra*, 535 U.S. at 323-325) and Petitioners have identified no good reason for the Court to revisit the issue in this case, especially since the State in no sense "took possession" of any property belonging to Petitioners. Furthermore, the conclusion that Petitioners lacked a sufficient property right to support their takings claims is amply supported by this Court's precedents, including the government's recognized power to forestall "grave threats to the lives and property of others." *Lucas*, 505 U.S. at 1029, n.16. The state's rapidly disappearing coast presents such a threat.

CONCLUSION

Simply put, the Plaintiffs/Petitioners ask this Court to review an interpretation of Louisiana law by the Louisiana Supreme Court, Louisiana's highest court. Under Rule 10 of this Court, there is no compelling reason for granting certiorari and the Petition should be denied.

Respectfully submitted,

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